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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 1026

ARTANUM IRRIGATION DISTRICT, a corporation, and THE STATE OF WASHINGTON, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered March 18, 1964, and printed in Appendix K hereto, pp. 244-246. Petition for rehearing was denied November 2, 1964, the printed opinion appearing in Appendix J hereto, pp. 241-243.

CITATIONS TO OPINIONS BELOW

This case was brought by the United States, as trustee for the Yakima Indian Tribe, in the United States District Court for the Eastern District of Washington, to quiet title to that tribe to certain designated

flows of water, including the entire flow of Ahtanum Creek during the months of July, August and September of each year. The court rendered an opinion, *United States v. Ahtanum Irrigation District, et al, 124 F. Supp. 818 (1954)*, and judgment of dismissal, from which the United States appealed.

The first opinion of the Court of Appeals for the Ninth Circuit, *United States of America vs. Ahtanum Irrigation District, et al*, reported *236 F. 2d 321 (C. A. 9, (1956) cert. den. 352 U. S. 988 (1956)*, printed in Appendix C hereto, pp. 25-74, remanded the case to the District Court for further hearings.

The final report of the Special Master appointed by the District Court to hear the case (R. 538-583) is unreported and is printed in Appendix D hereto, pp. 75-138.

The opinion of the District Court (R. 1091-1106) is unreported and is printed in Appendix E hereto, pp. 139-159.

The second opinion of the United States Court of Appeals for the Ninth Circuit, is reported in *330 F. 2d 897 (C. A. 9, 1964)* and printed in Appendix I hereto, pp. 190-240.

The opinion of the United States Court of Appeals for the Ninth Circuit on petition for rehearing is re-

ported in *338 F. 2d 307 (C. A. 9, 1964)* and printed in Appendix J hereto, pp. 241-243.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

The jurisdiction of the District Court was invoked by the United States under 28 U. S. C. §1345.

The judgment of the United States Court of Appeals for the Ninth Circuit was entered March 18, 1964. A timely petition for rehearing was filed, and was denied on November 2, 1964. On January 12, 1965, Associate Justice W. O. Douglas of this Court signed an order providing that

> "The time for filing petition for writ of certiorari in the above entitled cause be and the same is hereby extended to and including April 1, 1965."

QUESTIONS PRESENTED

In 1908, the United States through the Secretary of the Interior, acting on behalf of the Yakima Indians, and a group of pioneer settlers acting collectively, entered into an agreement in settlement of a controversy over their respective rights to the waters of Ahtanum Creek in the State of Washington, by which the parties agreed to limit their respective rights as follows:

> "ARTICLE 1. The party of the first part [United States] agrees to limit and define its claim to the

> waters of Ahtanum Creek and its tributaries as twenty-five per cent (25%) of the natural flow of said Creek, and the party of the second part [Pioneer settlers] agrees to limit and define its total and aggregate claim to the said waters as seventy-five per cent (75%) of the said natural flow of said stream, each party hereto surrendering and conceding to the other party all rights heretofore claimed in the said waters in excess of the amounts herein named." (Bracketed designations added.)

The questions presented are:

(1) Whether the Court of Appeals erred in construing the 1908 agreement to impliedly terminate the rights of the water users on the north side of Ahtanum Creek in the middle of the irrigation season, so as to award the entire natural flow of the stream to the Indians from July 10 for the remainder of the season, thus substantially destroying a long-established economy dependent, before 1908 and during the half century since that date, on irrigation from Ahtanum Creek during the summer months.

(2) Whether (if the duration of the summer flow of the stream prior to the 1908 agreement is relevant at all) the Court of Appeals erred in rejecting the concurrent findings of the Special Master and the District Court that there was natural flow available for irrigation in and prior to 1908 which was in fact diverted and used by the north side irrigators subsequent to July 10 and throughout each irrigation season, said rejection

being in contravention of the mandate of Federal Rules 52(a) and 53(e) (2) that such findings are to be accepted unless "clearly erroneous."

(3) Whether the Court of Appeals erred in construing the laws of the State of Washington (in contradiction of the Supreme Court of that State) to the effect that an appropriation of the natural flow of the stream is "measured by time," and thus ceases to have any effect at all (irrespective of its priority date) during the summer months when the stream flow is reduced but still available for diversion.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND AGREEMENTS INVOLVED

Article 1, Section 8, Clause 3 to the Constitution of the United States of America, reads in part as follows:

> "The Congress shall have power . . .
> (Cl: 3) "To regulate commerce with foreign Nations, and among the several States and with the Indian Tribes; . . . "

The Treaty of June 9, 1855, between the United States of America and the Yakima Tribe of Indians [1] is printed as Appendix A hereto, pp. 5-16.

4 U. S. C. §485 (1958) provides:

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[1] 12 Stat. 951.

"DUTIES OF SECRETARY. The Secretary of the Interior is charged with the supervision of public business relating to the following subjects:

"First. The public lands, including mines.

"Second. The Indians . . . "

Rev. Stat. §463 (1875), 25 U. S. C. §2 (1958), provides:

"Section 2. Duties of Commissioner. The Commissioner of Indian Affairs shall, under the direction of the Secretary of Interior, and agreeable to such regulations as the President may prescribe, have the management of all Indian Affairs and of all matters arising out of Indian relations."

Section 7 of the Act of February 8, 1887, 24 Stat. 390, 25 U. S. C. §381 (1958), provides:

"In cases where the use of water for irrigation is necessary to render the lands within any Indian Reservation available for agricultural purposes, the Secretary of the Interior is authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor."

The Court of Appeals considered a statute of the State of Washington dealing with water rights, R. C. W. 90.03.010, which provides:

"APPROPRIATION OF WATER RIGHTS — EXISTING RIGHTS PRESERVED. The power of

> the state to regulate and control the waters within the state shall be exercised as hereinafter in this chapter provided. Subject to existing rights all waters within the state belong to the public, and any right thereto, or to the use thereof, shall be hereafter acquired only by appropriation for a beneficial use and in the manner provided and not otherwise; and, as between appropriations, the first in time shall be the first in right. Nothing contained in this chapter shall be construed to lessen, enlarge, or modify the existing rights of any riparian owner, or any existing right acquired by appropriation, or otherwise. They shall however, be subject to condemnation as provided in RCW 90.03.040, and the amount and priority thereof may be determined by the procedure set out in RCW 90.03.110 through 90.03.240."

An Agreement of May 9, 1908,[2] entered into between the United States of America and the Ahtanum water users on the north side, is before the court for interpretation. The Agreement appears as Appendix B hereto, pp. 17-24.

Section 1, Session Laws of 1873, Washington Territory, page 520, is also involved and provides:

> "Be it enacted by the Legislative Assembly of the Territory of Washington, that any person or persons, corporation or company who may have or hold a title or possessory right or title to any agricultural lands within the limits of Yakima County, Washington Territory, shall be entitled to the use and enjoyment of the waters of the streams or creeks in said County for the purpose of irrigation

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[2] Defendants' Exhibit 116, R. 11690.

and making said land valuable for agricultural purposes to the full extent of the soil thereof."

STATEMENT OF THE CASE

The decision below would result in drying up a valley in the State of Washington that has been irrigated for over 100 years.

It does so by directing that diversions by north side users cease July 10 each year, at the onset of the driest part of the year, and that the Indians on the south side shall have the entire flow of the stream thereafter during the remainder of the irrigating season.

Ahtanum Creek, on which this valley is dependent, arises on the eastern slope of the Cascade Mountains and flows easterly through the valley, emptying into the Yakima River about four miles south of the City of Yakima, Washington.

The Ahtanum Valley is the cradle of irrigation in the State of Washington. Water was first turned out of Ahtanum Creek in 1847 by the Catholic Mission located on the north side of the creek. On June 9, 1855, a Treaty [3] was entered into between the United States of America and the Yakima Tribe of Indians, which described the boundaries of the Yakima Indian Reservation reserved to the Yakima Indian Tribe. The north boundary of the Reservation was described in part as:

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[3] Appendix A, page 5.

"Commencing on the Yakima River, at the mouth of Attah-nam River; thence westerly along said Attah-nam River to the forks; thence along the southern tributary . . . "

Irrigation progressed upon both sides of the stream for a period of approximately 50 years following the Treaty, when dissension arose as to the division of the water between the north side water users and the Indian Reservation to the south.[4] On August 18, 1906, one David Munn, a north side user, as plaintiff, filed in the Superior Court of Yakima County, Washington, a complaint against W. H. Redman and others[5] alleging that the defendants named were wrongfully diverting water from Ahtanum Creek and prayed for an injunction against them. The United States Attorney at Spokane, Washington, appeared for Redman privately with the approval of the Attorney General. The filing of this suit led to a considerable volume of correspondence between the United States Attorney and the Attorney General and between the Secretary of the Interior and officials of the Indian Irrigation Service. Plaintiff's counsel offered to dismiss the case if the United States would file a bill in equity to determine conflicting claims to

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[4] The small portion of the Yakima Indian Reservation served by Ahtanum Creek is a narrow strip of land lying on the north slope of Ahtanum Ridge between Ahtanum Creek on the north and Ahtanum Ridge on the south.

[5] Redman was an Indian Irrigation Service Engineer.

the waters of Ahtanum Creek. Although such a bill was prepared by the United States Attorney and approved by the Attorney General, it was not filed. [6]

In the latter part of the summer of 1907, at about the time the Government determined not to file the bill in equity, the Secretary of the Interior, James R. Garfield, made a trip to Yakima, conferred with officials of the Indian Service and the United States Attorney's Office, and also met with the owners of land on the north side of Ahtanum Creek. [7] The Secretary of the Interior expressed the opinion that the situation called for a settlement by agreement rather than by litigation, [8] and directed W. H. Code, Chief Engineer of the Indian Irrigation Service, to make field surveys. He did so, and submitted a comprehensive report to Secretary Garfield October 17, 1907. [9] The report indicated that the irrigated acreage of Indian land south of the creek was 1500 acres (this was about 21% of the total area irrigated), and that the non-reservation irrigated acreage north of the creek was 5500 acres, (*i. e.*, about 79%).

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[6] Appendix C, pages 37-40.

[7] Testimony of John H. Lynch, Defendants' Exhibit 122-A, pages 547-548.

[8] Plaintiff's Exhibit 79-160, pp. 140-141 (red page numbering).

[9] Plaintiff's Exhibit 79-6.

Thereafter, meetings were held with the non-reservation owners. A. G. Avery, the United States Attorney, participated in all of the meetings, representing the United States. It became apparent that it would be necessary to deal with the non-reservation owners as a group and powers of attorney from the water users to a designated committee of land owners were then obtained. [10]

After the north side water users had established their committee with power to act, Chief Engineer Code was directed by Secretary Garfield to come to Yakima and proceed with negotiations. The United States Attorney, A. G. Avery, continued to act as attorney for the Government, and H. J. Snively represented the north side water users. [11] The Agreement, before consummation, was transmitted by Chief Engineer Code to Secretary Garfield and received specific approval of Secretary Garfield and the Commissioner of Indian Affairs, C. F. Larrabee. [12] At the direction of the Secretary it was signed by Chief Engineer Code on behalf of the United States, and by the Water Users' Committee, on

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[10] Defendants' Exhibit 122-A, Testimony of John H. Lynch, pages 548-551.

[11] Testimony of John H. Lynch, Defendants' Exhibit 122-A.

[12] Plaintiff's Exhibit 79-159, pp. 28-29 (red page numbering).

May 9, 1908, and was approved by Frank Pierce, First Assistant Secretary of the Interior, June 30, 1908.

As the Agreement itself states, it constituted a permanent settlement of a dispute between the parties, executed to avoid threatened litigation:

> "THIS MEMORANDUM AGREEMENT, Made this ninth day of May, 1908, by and between the United States of America and its assigns, acting in this behalf by W. H. Code, Chief Engineer of Irrigation Indian Bureau, thereunto duly authorized by the Secretary of the Interior, party of the first part, and W. W. Glidden, et al users of water from the Ahtanum Creek on lands located north of and adjacent to the Yakima Indian Reservation, in Yakima County, State of Washington, their heirs, administrators, executors and assigns, acting in this behalf by D. E. Lesh, A. D. Eglin, J. . Wiley, D. B. Greenwalt, William H. Moyer, C. P. Swain, and H. D. Winchester, their duly appointed and constituted attorneys, party of the second part, WITNESSETH,
>
> "THAT WHEREAS the parties hereto claim certain quantities of water in Ahtanum Creek, County of Yakima, State of Washington, and a right to divert the same for irrigation purposes; and
>
> "WHEREAS, a dispute exists as to the extent of the respective rights of the said parties in and to said water.
>
> "Now, THEREFORE, the parties hereto, in order to avoid litigation and in order to limit and define their said respective rights in and to the waters of the said Ahtanum Creek, do mutually covenant and agree as follows:
>
> "ARTICLE 1. The party of the first part agrees to

> limit and define its claim to the waters of Ahtanum Creek and its tributaries as twenty-five per cent (25%) of the natural flow of said Creek, and the party of the second part agrees to limit and define its total and aggregate claim to the said waters as seventy-five per cent (75%) of the said natural flow of said stream, each party hereto surrendering and conceding to the other party all rights heretofore claimed in the said waters in excess of the amounts herein named." [13]

The agreement dividing the water 75% to the north side water users and 25% to the south side water users has been the basis of the north side's water rights since its execution. It did not purport to limit diversions by either side to the portion of the year ending July 10 or on any other date. Neither the south side users (substantially all being white tenants of Indian allottees for the 3500 acres of Indian owned land, together with those water users on 1000 acres in white ownership entirely) nor the north side users (for the most part descendants of the original pioneer settlers) have ceased to irrigate on July 10. Both for over 50 years, have irrigated with the waters in the creek.

Almost immediately after execution of the 1908 Agreement, and by 1915, the United States Indian Service, despite the fact that the agreement was based on 1500 irrigated acres on the south side, constructed irrigation works to make additional acreage susceptible

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[13] Appendix B, page 17.

to irrigation, and increased the total acreage irrigated annually on the south side to approximately 4500 acres as of the present time, thus creating an immediate and continuing demand for more water on the south side than had been retained by it in the 1908 agreement.

It also appears that additional acreage has been brought under cultivation on the north side, so that approximately 6400 acres is presently irrigated on the north side directly from Ahtanum Creek, (as compared to 5500 acres reported in 1907 by Code) but the north side has never claimed or demanded more water than was vested in the north side by the 1908 agreement. [14]

In 1925 the State of Washington instituted a proceeding to adjudicate the priorities among the north side water users [15] of the 75% of the natural flow recognized by the 1908 agreement. The United States was not a party to that suit, although it had an opportunity to appear. The resulting decree determined the relative rights of the north side water users among themselves, and under it certificates of title under state law were issued to the water users. [16] These certificates do not terminate the appropriators' right to divert on July 10, but are for the entire irrigation season.

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[14] Defendants' Exhibits 151, 152, 152-1.

[15] In re Ahtanum Creek, 139 Wash. 84, 245 Pac. 758.

[16] Defendants' Exhibit 31.

The present case was initiated on July 2, 1947, when the United States filed a complaint against over 700 north side water users and the Ahtanum Irrigation District *seeking the entire flow of the stream during the months of July, August and September on behalf of the Yakima Indian Tribe*. The State of Washington thereafter intervened. The trial in the District Court resulted in a judgment of dismissal,[17] from which the United States appealed. On July 10, 1956, the Court of Appeals for the Ninth Circuit filed it opinion,[18] which upheld the validity of the 1908 agreement dividing the waters of Ahtanum Creek 75% to the north side and 25% to the Yakima Indian Tribe, but remanded the case to the District Court for the purpose of making factual findings. Petition for writ of certiorari to this Court was denied January 28, 1957.[19]

Following remand, a Special Master, Honorable Smithmoore P. Myers, Dean of the Gonzaga University Law School, was appointed and conducted hearings which extended from March 18, 1957, to September 26, 1959, consuming 135 trial days and producing a voluminous factual record. The Master filed his detailed re-

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[17] United States v. Ahtanum Irr. Dist., 124 F. Supp. 818 (E. D. Wash. 1954).

[18] 236 F. 2d 321 (1956); Appendix C, page 25.

[19] 352 U. S. 988.

port [20] and proposed findings of fact, conclusions of law, and proposed judgment on the 15th day of April, 1960. He held in essence that the petitioners were entitled to 75% of the flow of Ahtanum Creek up to a flow of 76.3 c. f. s. and that the Indian Tribe was entitled to all of the flow in excess. He reported the acreages irrigated in 1908. Extensive exceptions were taken by the United States and the matter was argued on the Master's Report and exceptions before the Honorable William J. Lindberg, United States District Judge, who thereafter rendered his opinion, [21] and entered findings of fact, conclusions of law, and judgment [22] on the 30th day of January, 1962, which in most respects affirmed the report of the Special Master and adopted his proposals. Petitioners, Ahtanum Irrigation District, et al, filed objections to certain of the District Court's conclusions and made proposals in their stead. [23]

The United States appealed from the judgment of the District Court and, as noted, *supra*, the Court of Appeals rendered its opinion and judgment of the Court

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[20] Appendix D, page 75.

[21] Appendix E, page 139.

[22] Appendices F and G, pp. 160, 182.

[23] Appendix H, page 187.

of Appeals on March 18, 1964, [24] in which it "remanded with instructions." The Court of Appeals denied petition for rehearing on November 2, 1964. [25]

The 1964 opinion of the Court of Appeals for the Ninth Circuit generally accepts the findings and conclusions and judgment of the District Court, but with important exceptions in which the opinion modifies that judgment.

The critical modification of that opinion is this: Although the agreement of 1908 between the United States on the one hand and the north side water users on the other, is affirmed as a valid and binding agreement of the United States, dividing the waters of Ahtanum Creek 25% to the Indian Reservation on the south side and 75% to the users on the north side, the opinion of the Court of Appeals would limit the use of the water by the north side owners to a period in each irrigation season ending on July 10, just as the need for water becomes critical.

The specific language which the Court of Appeals added to the District Court's decree reads (330 F. 2d at 915 (1964):

"After the tenth day of July in each year, all the

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[24] 330 F. 2d 897; Appendix I, page 190; Appendix K, page 244.

[25] 338 F. 2d 307; Appendix J, page 241.

> waters of Ahtanum Creek shall be available to, and subject to diversion by, the plaintiff for use on Indian Reservation lands south of Ahtanum Creek, to the extent that the said water can be put to a beneficial use."

It is the importation of this language, not found in the 1908 agreement, which would destroy this valley by depriving it of all water for all purposes during the dry months. It is this innovation which brings petitioners to the Supreme Court of the United States seeking relief from the threatened destruction of their economy.

This is not a case in which powerful white men overreached helpless Indians. On the contrary, this is a case in which the parties were, on the one side, a struggling pioneer community of some 200 farm families, and, on the other side, the Secretary of the Interior, aided by the United States Attorney, the Commissioner of Indian Affairs, and the Chief Engineer of the Indian Irrigation Service. The question is whether, 57 years after the event, the contract that they signed and ratified, to permanently divide, by percentages, the water that both sides needed, is now to be retroactively rewritten so as to give the north side community no water at all during the dry half of the irrigation season.

REASONS FOR GRANTING THE WRIT

Petitioners urge the following reasons for granting the writ of certiorari:

(1) *The erroneous construction by the Court of Appeals of the subject matter of the 1908 agreement, i. e., the "natural flow" of Ahtanum Creek, conflicts with several decisions of this Court employing the term "natural flow" in its commonly accepted usage, and with prior decisions by the Ninth Circuit and at least one other Circuit accurately construing the term.*

Article 1 of the 1908 agreement specifies a limitation on the claims of *both* the Indian *and* the north side users keyed, in both instances alike, to percentages of the "natural flow" of Ahtanum Creek. Article 3 specifically defines "natural flow". There is no qualification in the agreement which restricts the natural flow to any particular time period. [26] There is no implication that as of July 10 the percentages change, so as to increase the Indians' percentage from 25% to 100%, and to decrease the north side users percentage from 75% to zero. Such an implication would be completely contrary to the intentions of the parties to the Agreement and wholly unjustified under the circumstances existing in 1908 and before, which led to the execution of the Agreement.

Absent any time restriction on the "natural flow" allocation, that phrase must be given its customary meaning to encompass all water naturally flowing in a stream at any time.

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[26] Appendix B, pages 17-22.

"Natural flow" is a term which has been employed uniformly by this Court in its accepted fashion in a number of interstate water controversies.[27] In *Nebraska v. Wyoming*, 325 U. S. 589 (1945), the court apportioned the natural flow of the North Platte, which it defined as follows (*id.* at 605):

> " . . . 'natural flow', as used by the Special Master and as used in this opinion, means all water in the stream except that which comes from storage water releases."

The Ninth Circuit has previously recognized the unrestricted compass of the term in *Gila Valley Irr. Dist. v. United States*, 118 F. 2d 509 (1941) in which it was defined as follows:

> "The natural flow of the stream is the amount of water which would flow therein if there was (sic) no artificial interference with the flow."

Similarily, the Court of Appeals for the Eighth Circuit has employed the term in its customary usage in *United States v. Tilley*, 124 F. 2d 850 (1941), *cert. denied*, 316 U. S. 691 (1942).

(2) *The decision of the Court of Appeals unnecessarily visits disaster upon a long-established irrigation economy, and the decision conflicts with equitable principles which this Court has followed in other water right*

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[27] See, e. g., Wyoming v. Colorado, 259 U. S. 419, 467, 470, 471, (1912); New Jersey v. New York, 347 U. S. 995, 1000 (1954); Colorado v. Kansas, 320 U. S. 383, 390 (1943).

cases in order to protect existing economies from destruction.

The novel addendum to the agreement of 1908 made by the Court of Appeals (reducing the north side's share from 75% to zero during the driest two-and-a-half months of the irrigation season) results in substantial destruction of the irrigation economy upon which this little community [28] has depended for more than a half-century. By contrast, this Court has refused to destroy an existing economy, not only in cases where there was doubt about the priority of its water rights, *Arizona v. California, et al.*, 373 U. S. 546, 563-64, 592-94 (1963), but even where the existing economy was founded on rights junior to those of other users. *Nebraska v. Wyoming*, 325 U. S. 589, 618, 621 (1945). *A fortiori*, this Court should exercise its jurisdiction to review a decision destroying the economy of the Ahtanum Valley, a decision which was reached solely by distortion of the plain language of an agreement designed specifically to preclude that very result.

The 1908 agreement provided a formula for the allocation of the natural flow, at any time and in whatever amount it might be available. As a practical matter, the formula is meaningful only in times of shortage,

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[28] The community now consists of about 500 families, of whom about 240 families are farmers. Agriculture is the sole underlying industry.

i. e., during the summer irrigation season, the very time when the Court of Appeals now construes it as being intended to become inoperative. There is no controversy, no need for proration, when the water supply is abundant. Both the north side users and the south side users (white tenants of allottees, white patent owners and a few Indians) have developed their economies within the framework of that agreement. Both, of course, have used water after July 10 to the extent it was available during the 50 years which have elapsed since the making of the agreement. This is their practical and uniform construction, and the only sensible construction. Water is available in the creek after July 10, as it was before 1908, and petitioners are entitled to their share of that water.

The far-reaching and disastrous effect of the deprivation of summer irrigation water, imposed by the present opinion, will be recognized by this court. Irrigation of petitioners' lands on the north side of Ahtanum Creek began approximately 113 years ago in the year 1852, and has continued during every irrigation season. The fathers and grandfathers of those presently living and farming in the Ahtanum Valley were invited into this area by the United States Government as pioneers, and encouraged to settle, irrigate and farm these lands for themselves and their descendants.

The Government, on its own volition, entered into

a solemn contract in 1908, making a division of the waters of the creek, which agreement the Court of Appeals upheld as valid.

Since 1908, two generations of people have moulded their lives in reliance upon the Government's word. Farmers, cattle raisers, orchardists, hop growers, business men and wage earners have developed the north side of Ahtanum Creek. Schools, churches, and towns have been built. The population has increased; the land has been utilized principally for the purpose of raising of crops; and a whole community of citizens of the State of Washington – a small community, but nevertheless entitled to live – is now making its livelihood in the Ahtanum Valley, relying upon receiving its share of the waters of Ahtanum Creek each irrigation season– and during *all* of the irrigation season – under the 1908 agreement.

Now, over fifty years later, the Court of Appeals has emasculated the agreement by adding to it a clause never agreed upon, which deprives the descendants of the pioneer settlers of all water shortly after the commencement of the summer irrigation period on July 10th of each year, for the very period when the percentage allocation becomes vital. The decree entered by the Court of Appals will most certainly render impossible economic farming of the valley in which the descendants of the 1908 pioneers still live. It will in effect de-

stroy the long-established economy of the Ahtanum Valley and of the families that are dependent upon Ahtanum Valley farming. A decision producing such unconscionable results should be reviewed by this Court.

(3) ***The Supreme Court should exercise its supervisory powers because the Court of Appeals improperly rejected the concurrent findings of fact of a Special Master and a District Court, in contravention of Federal Rule 52(a) requiring the acceptance of such findings unless "clearly erroneous."***

The length of time when water is available in any given year is wholly irrelevant, either to the interpretation of the 1908 Agreement, the underlying appropriative rights of the settlers, or the underlying reserved rights of the United States on behalf of the Indians. The water rights on both sides, howsoever founded, apply to whatever water is available at all times for the purposes set forth in the agreement.

But even if the question of the magnitude of the stream flow after July 10 in the year 1908, or any other year, were relevant, the Court of Appeals erred by contravening Rule 52(a) in its finding the period of availability of water for irrigation use for the petitioners and their predecessors did not extend beyond July 10 in each year. [29] There was evidence which persuaded the

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[29] United States v. Ahtanum Irrigation District, Appendix I, pp. 213-214.

Special Master and the District Court to make their concurrent findings to the contrary — which the Court of Appeals ignores — that there was water flowing in Ahtanum Creek during the irrigation season, and which was continuously needed and used for the *entire irrigation season.*

Finding No. 15 of the Special Master, adopted by the District Court, [30] found that the north side users

> "have established that their diversion requirements are 4.8 acre-feet during the year 1957 and were 3.7 acre-feet in the year 1908, with a *continuous flow requirement* of one-half miner's inch per acre *during the irrigation season.*" (Emphasis added.)

Indeed, in the lower court the United States *contended* that the "irrigation season" extended through July, August and September, which is an undisputed fact. [31] That is the very reason it brought this suit in the first place, to quiet its title to the whole flow in those three months. If the water does not, and never did, flow after July 10, what was there to sue about? Has the United States persisted in 18 years of litigation at staggering expense to these farmers to establish its title to a summer flow that does not, and never did, exist? If the creek did run in the summer during the years before 1908, the whole premise of the Court of

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[30] Appendix F, page 169.

[31] Contentions of United States in Pretrial Order on Merits, R. 251.

Appeals collapses. The findings of the Special Master and the District Court incorporated by reference the statement of agreed facts stipulated to by all parties. The Unied States Geological Survey stream flow records of the North and South Forks of Ahtanum Creek, which are a part of those agreed facts, show that in 1908 the stream flow as to quantity during the month of July was 6970 acre-feet with a maximum flow of 187 c. f. s., a minimum flow of 59 c. f. s., or an average flow of 112.5 c. f. s. In August, the quantity of water was 2715 acre-feet with a maximum flow of 59 c. f. s., a minimum flow of 36 c. f. s., or an average flow of 43.7 c. f. s. *Water for irrigation continued to be available after July 10 in 1908 and throughout each succeeding irrigation season thereafter without exception.* [32]

This summer water was most certainly needed and used by the north side farmers, for how else were late water crops, such as orchard and hops, grown in the years 1907 and 1908 as was the testimony in the record? [33]

Twelve years before the 1908 agreement, in 1896, a dispute over the irrigation waters of Ahtanum Creek was determined by the Supreme Court of the State of

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[32] Exhibits incorporated and attached to Pretrial Order on the Merits, R. 314-318.

[33] R. 11988-13643. References are detailed in "Supplement to Petition for Rehearing" filed with Court of Appeals.

Washington. It involved a dispute over *summer irrigation water*, not spring run-off, and it is apparent from the decision of the court that there was water available for use for irrigation all summer in the Ahtanum Valley.[34] The Special Master pointed out in his report (Appendix D, pp. 111-112) that he found evidence of hops requiring late water on lands in the Valley in 1908, and further pointed out that land owners on the north side by their very participation in the cases of *In re Ahtanum Creek* and *Benton v. Johncox, supra*, evidenced their interest in the *late summer water* and not just in the "abundant flood waters of May and June".

When the Court of Appeals says that there was no water available for use by the petitioners and their predecessors after July 10, 1908, it is ignoring the record.

The Court of Appeals, by virtue of Rule 52(a) of the Federal Rules of Civil Procedure, was not empowered to set aside the findings of the District Court, which were based upon the findings of the Master (see Rule 53(e)(2)), unless it could find them to be clearly erroneous. The Court of Appeals simply stated that there was a unanimity of evidence to the contrary. It was grievously mistaken in arriving at such a conclusion.

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[34] Benton v. Johncox, 17 Wash. 277, 49 Pac. 495. The Special Master determined the 1908 diversion duty by reference to this very case. App. D, page 104 et seq.

This Court has held that findings are clearly erroneous only when:

> "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." [35]

The record in this case will not support such a conclusion. Moreover, there was ample evidence to sustain the findings of season-long irrigation, and

> "such a choice between two permissible views of the weight of evidence is not 'clearly erroneous.' " [36]

The unwarranted action of the Court of Appeals in substituting its novel finding of non-availability of irrigation water after July 10 for the lower court's findings of season-long availability constitutes such a departure from the prescribed rules relating to the weight to be given to the findings of a trial court as to justify this Court in exercising its supervisory porwers in this case. Intervention by this Court is doubly justified because of the tragic consequences which flow from the unwarranted action of the Court of Appeals.

(4) *The Court of Appeals based its opinion that under the 1908 Agreement all water for the north side users should be terminated during the critical latter*

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[35] United States v. U. S. Gypsum Co., 333 U. S. 364, 394-95 (1948).

[36] United States v. Yellow Cab Co., 338 U. S. 338, 341-342 (1949).

half of the irrigation season, on an erroneous construction of the laws of Washington as to the rights which the 1908 Agreement afforded, in contradiction to the construction of those laws by the Supreme Court of the State of Washington.

The Court below characterized the 1908 agreement (330 F. 2d at 902), as did the District Court: "An agreement of this type, favored in the law as it operates to settle disputes, does not convey title to either party but merely establishes their respective rights," and said (with reference to its first decision in 236 F. 2d 321 (956)): "In short, our conclusion that the Secretary had this power was predicated upon our holding that the white settlers might in fact have water rights in and to the stream." (*id.* at 903.)

But the Court completely misconstrued the law of the State of Washington to arrive at the conclusion that the preexisting appropriative rights of the settlers ended on July 10 each year because there was no water after that date. The Court's factual premise, that water ceased to flow after July 10, contradicts concurrent findings of the Special Master and the District Court. (See part 3.) From this mistaken factual premise it moves to a mistaken legal conclusion.

The Court said (330 F. 2d at 908): "applicable here is the rule universally recognized as a part of the

law of waters in the western states that a water right may be measured by time as well as by volume." The Court has applied the wrong rule, and it conflicts with a decision of the Supreme Court of Washington construing State law in connection with the application of this very same 1908 agreement to these same state-generated water rights of the pioneer settlers. *(infra).*

Of course, an appropriation may be limited as to time, as in cases where appropriators rotate, by days of the week, their diversions from a stream, or where a junior appropriation is limited to the surplus available during specified months of high water, or where the appropriation, on its face, is limited to the time during which the appropriator has need for the water, e. g., the summer irrigating season, not the winter. State administrative agencies write such accommodations into the permits and certificates they issue, and courts write them into their decrees. That is not this case. The appropriations here were for irrigation purposes. Irrigation is needed during the hot summer months, July, August, September., (That is why the Government sued for the whole flow during those same months.) The appropriations were not "measured by time" either on their face or in the certificates which the State issued. Under the laws of Washington the *res* to which the appropriations in this case were applicable was the *whole* flow of the stream for the *whole* time that water ap-

peared in the stream and was required for irrigation.

The 1908 agreement accorded the pioneer settlers 75%, the Indians 25% of that same *res*. It did not limit either of them as to time, it did not reduce the one or enlarge the other, as the stream rose and fell. Neither side was to be destroyed by drouth; that was the very purpose of the agreement.

The State of Washington, with the encouragement of the Government, adjudicated the water rights vested in the north side users in 1925 in *In re Ahtanum Creek*, 139 Wash. 84, 245 Pac. 758. The Supreme Court of the State of Washington understood that the waters to which the appropriations of the north side users were related under Washington law were *all* the waters for *all* of the season. It did not construe the laws of Washington as limiting these rights to the wet season of the year. It was the whole flow which was therein referred to as the "natural flow," apportioned and divided between the United States on the one hand and residents of the State of Washington on the other. The court said (139 Wash. at 88, 245 Pac. at 760):

> "Twenty-five per cent of the *water of the streams* is owned by the United States, and controlled and administered by the Indian Bureau for the use and benefit of Yakima Indian lands under irrigation, *leaving seventy-five per cent of the waters to be adjudicated herein.*" [37] (Emphasis added.)

[37] The Referee in his report on the adjudication (Defendant's Exhibit 14, page 6) and the Superior Court of Yakima County in its Decree (Defendants' Exhibit 13, page 2) interpreted the agreement to the same effect.

There is no suggestion that the appropriations to be adjudicated were only good against those waters which flowed before July 10.

The decisions of the courts of the State of Washington have always contemplated a full seasonal use of irrigation water.[38] The Supreme Court of the State of Washington in water rights matters prior to and immediately following 1908 uniformly indicated that the "natural flow" of waters as applied to those with riparian rights meant the *full flow of the water without diminution and without alteration.*[39] Thus, in 1905, immediately preceding the agreement, the Supreme Court of the State of Washington, in *Madson v. Spokane Valley Land Co.*, 40 Wash. 414, 82 Pac. 718, had described a riparian right as encompassing *"the uninterrupted use* of the water in its *natural flow* or condition upon his land." (Emphasis supplied.)

Following the 1925 decision, certificates were issued by the State of Washington to these appropriators. (R. 9132, Defs. Ex. 31) These certificates show rights

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[38] "Thus it will be seen that the measure of the appropriation, as defined in § 1 of the act of November 13, (supra, p. 7 herein) is the making of 'said land available for agricultural purposes to the full extent of the soil thereof.' " Longmire v. Smith, 26 Wash. 439 at P. 448, 67 Pac. 246 at p. 249 (1901).

[39] Still v. Palouse Irrigation and Power Co., 64 Wash. 606, 117 Pac. 466 (1911); New Whatcom v. Fairhaven Land Co., 24 Wash. 493, 64 Pac. 735 (1901).

of diversion in cubic feet per second for specified tracts of land. Neither they nor the pre-1908 appropriations which they express, purport to be appropriations "measured by time."

The Court of Appeals was completely wrong in its interpretation of Washington law in which it assumed that the pioneers' appropriations were "measured by time." It was therefore wrong when it concluded that, since they owned nothing after July 10, the agreement of 1908 was not intended to recognize any right in them after that date. It was thrice wrong when it deduced from these false premises, 56 years after the event, that the United States, in making this agreement with these pioneers, had intended (and that they had agreed) that they should have no water at all during the season of the year when they needed it most, and that this was what the law of their State had meant when they had made the appropriations, long before 1908, which the United States proposed that they settle in that year.

The Court of Appeals has not only misconstrued the law of Washington: it has created an innovation in western water law which, if allowed to stand, will shake the foundations of all appropriations of the characteristically summer-parched natural flow of the streams in all of the states in the Ninth Circuit. The innovation: that an appropriation of natural flow, although not limited on its face to a specified season of the year, and irre-

spective of priorities, is cut off by operation of law upon the onset of the low summer flow season; and that the low flow may then be taken by another.

CONCLUSION

This tragedy began with the decision of the United States, in 1907, not to file the bill in equity which it had prepared at the request of the pioneer settlers in order to determine the relative rights of the Indians and the settlers to the low summer flow of the creek. Instead, in 1908, the Secretary of the Interior proposed, and the settlers accepted, a compromise agreement which divided the water between them. Forty years later, in 1947, the government filed this suit, *first* to repudiate the Secretary's authority to make the compromise that he had persuaded the settlers to sign, (the lower court refused to permit that), *second* to construe the agreement so as to take away from these farmers the entire flow of the stream in July, August, and September—the three months of scarcity which had necessitated the agreement in the first place.

Although this summer flow is so valuable in the dry season that the government now has spent eighteen years in litigation to take it away from our people, the rationale of the Court of Appeals opinion is that the 1908 agreement was not intended to cover this summer flow because there was none after July 10.

The end result, if this strange opinion is permitted to stand, will be to destroy a community whose livelihood depends now, just as it did before these farmers made the 1908 agreement and just as it has depended during the half century which has since elapsed, upon their right to use their agreed share of the waters that the Court of Appeals asserts do not exist but which the government nevertheless, seeks to take.

Water for Indian farmers is not involved here except in two or three instances. The bulk of the Indian lands are rented to white farmers and what is actually involved here is rental money. Judge Chambers, in his concurring opinion,[40] pointed the way for the Government. It has its Congress where relief may be sought for any injustice of the past for which it is responsible. The solution to injustice to the Indians, if there be any, does not lie in an attempt to take away the water which the north side users now own and to give it to the south side. Promulgating another injustice on these innocent petitioners is not the course of fairness or of wisdom.

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[40] United States vs. Ahtanum Irrigation District, et al, 236 F. 2d 321 (1956) Appendix C, at pages 73-74.

For the reasons stated in this petition, we respectfully ask that certiorari issue to review the decision below.

Respectfully Submitted,

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